

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

DAN BERRY,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

) Case No. DISM-02-0067

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and BUSSE NUTLEY, Member. The hearing was held in the conference room at the Eastern State Hospital in Spokane, Washington, on September 25 and 26, 2003. GERALD L. MORGEN, Vice Chair, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Dan Berry was present and was represented by Christopher Coker, Attorney at Law, of Parr & Younglove, P.L.L.C. Donna Stambaugh, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, gross misconduct, and willful violation of published employing agency or Department of

Personnel rules or regulations. Respondent alleges that Appellant psychologically (verbally) and physically abused a patient.

## II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent Department of Social and Health Services (DSHS). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on August 23, 2002.

2.2 At the time of his dismissal, Appellant was a Mental Health Technician 2 at Eastern State Hospital. Appellant began working for Eastern State Hospital (ESH) in October of 1989. ESH is an acute psychiatric hospital for patients 18 or more years of age. As a Mental Health Technician, Appellant's responsibilities included the care of patients such as bathing, feeding, dressing, and generally assisting them.

2.3 Appellant had no history of prior formal disciplinary action; however, his personnel file included the following:

- A January 4, 1991 performance evaluation included the comments, "[Appellant] needs to improve on interpersonal relationships with staff as well as patients. With patients when doing admissions at times has a way of agitating the patient."
- A June 13, 1990 performance evaluation included the comments, "At times [Appellant] is unsure of appropriate methods of intervention with aggressive patients and will need assistance to develop skills in this area."

2.4 DSHS policies prohibit abuse of patients and require staff to abide by professional and ethical standards of conduct. DSHS Administrative Policy 6.04, Standards of Ethical Conduct for

1 Employees, requires employees “to perform duties and responsibilities in a manner that maintains  
2 standards of behavior and promotes public trust, faith, and confidence.”

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4 2.5 DSHS Administrative Policy 8.02, Client Abuse, addresses the need to protect the safety of  
5 clients at all times. The policy defines abuse as “an act of physical or mental mistreatment or injury  
6 which harms or threatens ...” Emotional/verbal abuse includes the use of profanities and/or  
7 obscenities in the client’s presence, and physical abuse includes “squeezing, pinching, slapping,  
8 striking (with or without an object), pushing and using excessive force while restraining an agitated  
9 patient.”

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11 2.6 Eastern State Policy 1.21, Staff-Patient Relationships, directs employees to develop a  
12 “therapeutic relationship” that accepts the patient as a human being with dignity and establishes and  
13 maintains trust in order to affect a change in the patient’s response to his/her problems.

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15 2.7 Eastern State Policy 2.9, Patient Abuse, states that patient rights are paramount and all  
16 employees are to assure that those rights are honored to the full extent.

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18 2.8 In January 1997, Appellant received Safe and Therapeutic Aggression/Assault Reduction  
19 Techniques training. In January 1990, Appellant attended Professional Assault Response Training  
20 and learned methods to de-escalate agitated patients.

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25 2.9 By letter dated July 31, 2002, Harold Wilson, Chief Executive Officer of Eastern State  
26 Hospital, informed Appellant of his suspension from August 3, 2002 through August 17, 2002,

1 inclusive, to be followed immediately by his dismissal effective August 18, 2002. Mr. Wilson  
2 charged Appellant with neglect of duty, gross misconduct, and willful violation of published  
3 employing agency policies for psychologically (verbally) and physically abusing Chet, a patient, on  
4 May 19, 2002 while Chet was being restrained by Appellant, Tammy Knaeble, and Dan  
5 Vandenberg. Mr. Wilson alleged that Appellant, after being struck by Chet, said, "Don't you  
6 fucking slug me in the face," and struck Chet with a closed fist on the side of his face and placed his  
7 hand and knee against Chet's throat.

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9 2.10 On the morning of May 19, 2002, the mental health technicians on Appellant's ward began  
10 to gather the patients for their medication. Chet became agitated, and Ms. Knaeble took him to the  
11 "timeout room" to give him time to calm down. Appellant and Mr. Vandenberg entered the  
12 "timeout room" to assist Ms. Knaeble with Chet.

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14 2.11 Chet willingly laid down on the "timeout" mat and surrendered his various personal items as  
15 requested, but he became extremely agitated and began to resist when Mr. Vandenberg asked for his  
16 watch. Chet was flailing and struggling, which required Appellant, Ms. Knaeble, and Mr.  
17 Vandenberg to restrain him. Appellant leaned over Chet to assist Mr. Vandenberg in removing the  
18 watch, and Chet struck Appellant in the face. The events that ensued are in dispute.

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20 2.12 Appellant testified that he could not remember directing a profanity at Chet; however, he  
21 admits that he may have made the comment in reaction to Chet striking him in the face. Appellant  
22 denied striking Chet and placing his hand and knee against Chet's throat, and he asserts that he put  
23 his knee on Chet's shoulder to pin him in an attempt to restrain him.

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25 2.13 Ms. Knaeble testified that she heard a "pop" followed by Appellant stating to Chet, "Don't  
26 you fucking slug me in the face." Ms. Knaeble observed Appellant pull back his arm and swing

1 down with a glancing blow to the side of Chet's jaw and neck. Ms. Knaeble also saw Appellant  
2 place his finger and thumb on Chet's neck.

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4 2.14 Mr. Vandenberg also heard a "pop" and heard Appellant use profanity directed at Chet. Mr.  
5 Vandenberg observed out of the corner of his eye as Appellant swung his arm back. However, he  
6 did not observe Appellant's arm come down to strike Chet nor see Appellant place his finger and  
7 thumb on Chet's neck.

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9 2.15 Based on a preponderance of the credible testimony, we find that Appellant said to Chet,  
10 "Don't you fucking slug me in the face" and pulled his arm back and swung down in an attempt to  
11 strike Chet. The evidence is inconclusive as to whether Appellant was successful in actually  
12 striking Chet because Chet was struggling and flailing about in an attempt to break free from being  
13 restrained. The evidence is also inconclusive as to whether Appellant placed his knee on Chet's  
14 shoulder as he claimed, or if he placed his finger and thumb on Chet's neck as described by Ms.  
15 Knaeble.

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17 2.16 Ms. Knaeble reported the incident to Laura Fraijo, Registered Nurse, who was in charge that  
18 day as the acting supervisor. Ms. Fraijo questioned Chet in his room. Chet was unable to  
19 remember being in the "timeout" room, striking Appellant, or whether Appellant had struck him.  
20 Ms. Fraijo observed no signs of having been struck.

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24 2.17 Ms. Fraijo met with Appellant to discuss Chet striking him, and she examined his face for  
25 marks, redness, or bruising. She could find no signs that he had been struck; however, Appellant  
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1 reported that his face was tender and sore. Ms. Fraijo instructed Appellant to fill out the  
2 appropriate paperwork to reference being struck by Chet and then to go home.

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4 2.18 On May 20, 2002, Phil Wozniak, Acting Director of the Human Resources Division,  
5 referred the allegations of patient abuse to the Washington State Patrol for a criminal investigation.  
6 Detective Tracey Hansen was assigned to conduct the investigation. On June 13, 2002, Detective  
7 Hanson completed her investigation.

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9 2.19 Prior to making a finding of misconduct, Mr. Wilson reviewed Detective Hansen's  
10 investigative report and the relevant agency policies. On July 29, 2002, Mr. Wilson conducted a  
11 pre-termination review to give Appellant an opportunity to respond to the allegations. After  
12 meeting with Appellant, Mr. Wilson concluded that Appellant had failed to provide any mitigating  
13 circumstances for his actions.

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15 2.20 Mr. Wilson concluded that Appellant had subjected Chet to physical and psychological  
16 abuse by using profanity, striking him with a closed fist on the side of his face, and placing his hand  
17 and knee against Chet's throat. Mr. Wilson concluded that Appellant's misconduct interfered with  
18 the hospital's responsibility to generate public trust and confidence by providing patients with the  
19 best possible care. He concluded that Appellant neglected to treat Chet in a therapeutic manner and  
20 engaged in gross misconduct when he subjected Chet to physical abuse.

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22 2.21 Mr. Wilson concluded that Appellant violated DSHS Administrative Policies 6.04 and 8.02,  
23 and ESH Policies 1.21 and 2.29 by subjecting Chet to both psychological and physical abuse and by  
24 failing to conduct himself within accepted standards of behavior.

1 2.22 In determining the level of discipline, Mr. Wilson considered a number of factors, including  
2 Appellant's 14 years of service, his employment record, his performance evaluations, his training  
3 and knowledge of the hospital's policy against patient abuse, and his responsibility to provide  
4 therapeutic care to the patients. The level of safety risk that Appellant posed to patients concerned  
5 Mr. Wilson, and he concluded that he could not trust Appellant not to repeat his abusive behavior.  
6 Because Appellant's actions were egregious and severe, Mr. Wilson concluded that dismissal was  
7 the appropriate sanction.

### 8 9 **III. ARGUMENTS OF THE PARTIES**

10 3.1 Respondent argues that ESH has a responsibility to protect patients and provide them with  
11 the best possible care and quality of life. Respondent asserts that both Ms. Knaeble and Mr.  
12 Vandenberg heard a "pop," heard Appellant curse at Chet, and saw Appellant's arm swing back.  
13 Respondent contends that Ms. Knaeble saw Appellant's arm come down and deliver a glancing  
14 blow to Chet's face. Respondent argues that Ms. Knaeble also saw Appellant put his thumb and  
15 finger on Chet's neck. Respondent asserts that Appellant clearly abused Chet. Respondent  
16 contends that ESH has a policy of not tolerating patient abuse under any circumstances, and that  
17 Mr. Wilson had no choice other than termination due to the egregious nature of Appellant's actions.

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19 3.2 Appellant argues that he did not strike Chet or put his finger and thumb in Chet's neck, and  
20 he asserts there is no corroborating evidence to support such a claim. Appellant asserts that he  
21 placed his knee on Chet's shoulder to restrain him. Appellant contends that he was employed at  
22 ESH for 14 years with an impeccable employment record and no history of abusive behavior.  
23 Appellant argues that he has a reputation of being kind and gentle with patients, and he had a good  
24 relationship with Chet. Appellant argues that dismissal was too severe a sanction and asks the  
25 Board to reinstate him.

#### IV. CONCLUSIONS OF LAW

4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter herein.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987).

4.4 Respondent has met its burden of proving by a preponderance of the credible evidence that Appellant cursed at Chet and swung his arm back in an attempt to strike him. This behavior alone clearly constitutes both physical and psychological abuse.

4.5 Respondent has met its burden of proving that Appellant neglected his duty when he behaved in an abusive manner toward Chet, failed to treat Chet with dignity and respect, failed to honor Chet's rights as a patient, and failed to treat Chet in a therapeutic manner. Appellant further neglected his duty by failing to provide patients with an environment that was free of intimidation, hostility, threatening, or abusive behavior.



1 4.6 Gross misconduct is flagrant misbehavior that adversely affects the agency's ability to carry  
2 out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant  
3 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's  
4 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

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6 4.7 Respondent has met its burden of proving that Appellant's action rose to the level of gross  
7 misconduct. Appellant's hostile, offensive, intimidating, and abusive behavior towards Chet  
8 impacted the ability of Eastern State Hospital to accomplish its mission of providing a safe and  
9 therapeutic environment for a resident of the hospital.

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11 4.8 Willful violation of published employing agency or institution or Personnel Resources  
12 Board rules or regulations is established by facts showing the existence and publication of the rules  
13 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
14 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

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16 4.9 Respondent has met its burden of proving that Appellant willfully violated DSHS  
17 Administrative Policies 6.04 and 8.02, and Eastern State Policies 1.21 and 2.29 by using profanity  
18 toward and attempting to strike Chet. Appellant failed to conduct himself within accepted standards  
19 of behavior and subjected Chet to both psychological and physical abuse.

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21 4.10 In determining whether a sanction imposed is appropriate, consideration must be given to  
22 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
23 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
24 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
25 program. An action does not necessarily fail if one cause is not sustained unless the entire action  
26 depends on the unproven charge. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

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2 4.11 Based on Appellant's egregious behavior, Respondent has established that the disciplinary  
3 sanction of dismissal was not too severe and was appropriate under the circumstances presented  
4 here. Therefore, the appeal should be denied.

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6 **V. ORDER**

7 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Dan Berry is denied.

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9 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

10  
11 WASHINGTON STATE PERSONNEL APPEALS BOARD

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13 \_\_\_\_\_  
14 Walter T. Hubbard, Chair

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16 Busse Nutley, Member